No. 80-802

IN THE

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ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1980

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER, a Missouri Not-For-Profit Corporation,

Petitioner,

v.

BLUE CROSS OF KANSAS CITY, a Missouri Corporation, and BLUE CROSS ASSOCIATION, an Illinois Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief Of Federation Of American Hospitals As Amicus Curiae In Support Of Petitioner National Gerimedical Hospital And Gerontology Center

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J. Christianson and W. McClure, Developing a Regulatory Strategy Consistent with a Competitive Health Care System, in Socioeconomic Issues of Health 1980 17

C. Havighurst, Regulation of Health Facilities and Services by Certificate of Need, 59 Va. L. Rev. 1143 (1973) 17

F. Miller, Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act and Regulatory Capture, 68 Geo. L.J. 873 (1980) 8, 16

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I. INTEREST OF AMICUS CURIAE

The Federation of American Hospitals (FAH) is a nonprofit corporation organized and existing under the laws of the State of New York which represents the interests of approximately 1100 investor owned acute care hospitals located throughout the United States and its possessions by means of direct membership and affiliated state associations. FAH is the recognized spokesman for such hospitals and, as such, has

received the consent of the parties hereto to file an Amicus Curiae Brief in support of petitioner National Gerimedical Hospital and Gerontology Center.[1]

FAH and its members have a direct and immediate interest in this case because the overwhelming majority of its members contract with Blue Cross plans throughout the country. Moreover, a substantial portion of FAH members are located in states which have enacted planning legislation pursuant to the National Health Planning and Resources Development Act of 1974. FAH members throughout the country, therefore, will ultimately be affected by this Court's decision.

FAH was granted permission to file an Amicus Curiae Brief in support of petitioner before the Eighth Circuit Court of Appeals. Now that the matter is before this Court, FAH again believes that, to the greatest extent practicable, a full airing of all facts, issues and arguments involved is required. Accordingly, FAH herewith files its brief as Amicus Curiae.

II. SUMMARY OF ARGUMENT

The antitrust laws represent a fundamental national economic policy that favors a competitive order prevailing in the market place. That policy may be supplanted only where Congress has expressly determined to do so, or in particular and discrete circumstances where there is a "plain repugnancy" between a congressionally enacted regulatory scheme and unfettered competition that would be required by the antitrust laws.

The regulatory scheme at issue in this case was created by the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k *et seq.* (hereinafter "the Act"), which was designed to facilitate the development of recommendations

[1] FAH previously appeared before this Court as an *amicus curiae* in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976).

and resources for a national health planning policy. The Eighth Circuit Court of Appeals held that the Act contained within it the "plain repugnancy" to the antitrust laws required to find an exception to the general application of those laws to the health care industry. In so holding, it determined that voluntary actions by private health care organizations, ostensibly consistent with national health planning policies, were exempt from scrutiny under the antitrust laws.

The Eighth Circuit holding is an unwarranted and unsupported extension of the implied repeal doctrine to conduct that was neither mandated nor coerced by any statute or regulation, was not subject to review by any governmental agency and was not specifically contemplated by the Act under review. The decision by the Eighth Circuit Court of Appeals must be reversed.

III. ARGUMENT

A. Introduction

Petitioner is a Missouri not-for-profit corporation which operates a fully accredited general acute care community hospital which opened in October, 1978. Prior to commencing operation, petitioner sought a contract from respondent Blue Cross of Kansas City ("Blue Cross") in order to become a Blue Cross "participating hospital."[2]

Those hospitals which are "participating hospitals" receive 100 percent payment for covered hospital services rendered to Blue Cross subscribers. By contrast, subscribers who receive

[2] Blue Cross is a Missouri not-for-profit health care service corporation which offers its private individual and group health care plans and programs to the general public in Western Missouri and Eastern Kansas. It contracts with "participating hospitals" and with other health care providers for the provision of health care services as set forth in its various health plans.

covered services at non-participating hospitals are reimbursed only 80 percent of the hospital's charge, and reimbursement is made directly to the subscriber, rather than the hospital. Blue Cross subscribers account for approximately one-fourth of all hospital admissions in the Western Missouri and Eastern Kansas area. At the time this action was filed, with the exception of petitioner, all licensed general acute care community hospitals in the Blue Cross service area were participating Blue Cross hospitals.

Petitioner was unable to obtain a Blue Cross contract because it could not, as a condition precedent, secure the required "need approval" from Mid-America Health Systems Agency ("MAHSA"), which had previously publicly stated that it would disapprove any additional acute care hospital beds in its health service area.[3]

Because of MAHSA's public posture, petitioner did not seek "need approval" prior to submission of its application for a Blue Cross contract, and its application was, predictably, denied. Petitioner then filed the within action contending that respondents Blue Cross and BCA conspired to engage in a boycott and to coerce Blue Cross subscribers to refuse to deal with petitioner in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Petitioner further alleged that Blue Cross' refusal to contract with it constituted an abuse of monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.[4]

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[3] MAHSA, organized under the Act as a health systems agency, is a private not-for-profit Missouri corporation engaged in voluntary health planning in the metropolitan Kansas City area. It had been designated by Blue Cross and Blue Cross Association ("BCA") to make determinations of "need". MAHSA had no power to enforce its "need approval" determinations, nor was it required to make such determinations under any federal or state statute or regulation.

[4] The District Court found that the conspiracy allegations were not subject to dismissal for failure to properly allege a cause of action under Section 1 of the Sherman Act. 479 F.Supp., at 1024. This finding was not reviewed by the Court of Appeals.

The District Court for the Western District of Missouri dismissed petitioner's antitrust claims on the ground that the Act impliedly repealed the antitrust laws with respect to "action taken pursuant to the Act and clearly within the scope of the Act." 479 F.Supp. 1012, 1024 (W.D.Mo. 1979). The District Court held there was a "blanket exemption" for what would otherwise be anticompetitive conduct because "voluntary cooperation of the entire health care industry, including third party payors [was] essential to the success of the Act." 479 F.Supp., at 1021.

The Court of Appeals for the Eighth Circuit affirmed, adopting in large measure the decision of the District Court. 628 F.2d. 1050 (8th Cir. 1980). The Eighth Circuit did not, however, find that the Act created a "blanket exemption", but stated that "the doctrine of implied immunity applies to Blue Cross voluntary cooperation with the congressionally designated HSA in requiring approval from MAHSA prior to applying for a Blue Cross membership contract." 628 F.2d., at 1057. The Eighth Circuit affirmation was based upon its acceptance of the District Court's review of the legislative history and finding a "clear repugnancy" between the Act and the antitrust laws, and its own finding that "the Act and regulatory scheme clearly call for the action which has now become the basis of an antitrust claim." 628 F.2d., at 1055-1056.

In so holding, however, the Court of Appeals did not find that *respondents' conduct* was mandated or coerced by any statute, regulation, or government agency activity. Similarly, the Court of Appeals did not determine that *MAHSA's conduct* was mandated or required by any statute or regulation. Finally, the Court of Appeals did not find that respondents' or MAHSA's conduct was subject to review or supervision, in any fashion, by any federal or state agency.

As will be discussed more fully, the holding of the Court of Appeals is, therefore, a radical departure from precedents established by this Court in other cases addressing the application of the implied repeal doctrine. Moreover, the Court of

Appeals' decision was not based upon an in-depth scrutiny of the interaction between the regulating agency and the antitrust actors as this Court has consistently required in implied repeal cases. Finally, the Court of Appeals' decision was based on an erroneous construction of congressional intent with respect to antitrust immunity.

B. The National Health Planning and Resources Development Act of 1974

The Act was passed by Congress to "facilitate the development of recommendations for a national health planning policy, to augment areawide and state planning for health services, manpower and facilities, and to authorize financial assistance for the development of resources to further that policy." 42 U.S.C. § 300k. To accomplish these purposes the Act established, through a series of grants made by the Department of Health, Education and Welfare (currently the Department of Health and Human Services), a voluntary nationwide system of health planning and development organizations consisting of three tiers: health system agencies (HSAs); State Health Planning and Development Agencies; and Statewide Health Coordinating Councils (SHCCs). *See generally Montgomery County, Maryland v. Califano,* 449 F.Supp. 1230 (D.Md., 1978).[5]

1. *Health System Agencies.*

The Act requires that HSAs be established for each geographic or regional area deemed appropriate for the planning and development of health services as determined by the governor of each state. An HSA may be organized as a nonprofit private corporation

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[5] It is important to emphasize that the entire health planning mechanism established by the Act is voluntary. No state is required to participate in the planning program or the scheme it establishes. Those states choosing not to participate, however, face the loss of grants, loans or contract monies available from the federal government under the Community Mental Health Centers Act and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970. 42 U.S.C. § 300m(d).

"[w]hich is not a subsidiary of, or otherwise controlled by any other private or public corporation or other legal entity and which only engages in health planning and development functions . . . ." 42 U.S.C. § 300l-1(b) 1(A).[6]

A majority (but not more than 60%) of the members of its governing body must be residents of the area who are consumers of health care and broadly representative of the population and geography in the area. The remainder of the members must also be residents of the area, but must be providers of health care representing health care institutions (such as petitioner's competitors herein), health care insurers (such as respondents herein), physicians, health professional schools and the allied health professions. 42 U.S.C. § 300l-1(b)(3).

The Act directs the HSA to function in two capacities. First, in a *pure planning* capacity, the HSA is required to:

(1) Establish long term health systems plans (HSPs) and short-term annual implementation plans (AIPs) which are statements of goals and objectives for health care planning in the health service area, 42 § 300l-2(b)(2), (3) U.S.C. § 300l-2(b)(2), (3);

(2) Implement its HSP and AIP by seeking, "to the extent practicable" the assistance of individuals and public and private entities in its health service area, 42 U.S.C. § 300l-2(c)(1);

(3) Make grants to public and private entities and enter into contracts with individuals and public and nonprofit private entities to assist them in planning and developing projects and programs determined by the HSA to be necessary, 42 U.S.C. § 300l-2(c)(3); and

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[6] The Act also allows an HSA to be a public regional planning body or a single unit of general local government. 42 U.S.C. § 300l-1(b)(1)(A), (B).

(4) Assist State Health Planning and Development Agencies in making determinations by forwarding *recommendations* to them respecting new institutional health services and projects for the modernization, construction and conversion of medical facilities in the health service area. 42 U.S.C. § 300l-2(f), (g), (h).

In essence, in its *pure planning* capacity, the HSA is directed to formulate general guidelines for health planning within its area and make recommendations to governmental agencies based upon those guidelines. *See* F. Miller, Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act and Regulatory Capture, 68 Geo. L.J., 873, 883-885 (1980) (hereinafter *"Miller"*); M. K. Schonbrun, Making Certificate of Need Work, 57 N.C.L. Rev. 1259, 1277-1280 (1979).

The second capacity in which the HSA functions is the review and approval of proposed uses of federal funds under specified federal acts. 42 U.S.C. § 300l-2(e)(1)(A).[7] These decisions, unlike HSA *recommendations* made in the course of its *planning function,* may be appealed by the interested party to the Secretary. 42 U.S.C. § 300l-2(e)(2).

The Act does not require that an HSA participate in private decision making or play any adjudicatory role other than in the review and approval of proposed uses of federal funds, and then only in specified instances. The Act does not give an HSA the authority to determine whether a new health facility shall be allowed to operate, to receive funding or to contract with any party, private or governmental. That authority, to the

[7] The acts referred to are the Community Mental Health Centers Act, Sections 409 and 410 of the Drug Abuse Prevention, Treatment, and Rehabilitation Act and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970.

extent it is established by the Act, rests with the appropriate state health planning and development agency. *See* 42 U.S.C. § 300m-2(a).

2. *Health Planning and Development Agencies*

The second level of organization mandated by the Act is the State Health Planning and Development Agency. 42 U.S.C. §§ 300m, *et seq.* This is the agency within state government designated by the governor to perform health planning and development functions. Those functions include:

(1) The conduct of health planning activities of the state and the implementation of those parts of the State Health Plan, and the plans of the health systems agencies, which relate to the government of the state;

(2) Preparation and review as necessary of a State Health Plan which is made up of all the HSPs of the HSAs within the state; and

(3) *Service as the designated planning agency of the state to administer a certificate of need (CON) program which applies to new institutional health services to be offered or developed within the state.* 42 U.S.C. § 300m-2(a).[8]

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[8] During the period in question in this litigation (1) the State of Missouri had not enacted a Certificate of Need law to be applied to new institutional health services to be offered or developed within the state, such as petitioner's; (2) nor had Missouri designated a state agency to review and determine the need for health care facilities prior to the time facilities, such as the petitioner's, were constructed, as it was not then a participating state in the Section 1122 Capital Health Care Expenditures Program (42 U.S.C. § 1320a-1) having previously terminated its agreement for this purpose in June, 1976.

In August, 1979 Missouri enacted a Certificate of Need law (Mo. Ann. Stat. §§ 197.300 *et seq.* [Vernon Supp. 1980] which became fully effective on October 1, 1980. It provides that any "health care facility which has commenced operations prior to October 1, 1980, shall be deemed to have received a Certificate of Need. . . ." In this case, petitioner is deemed to have received state agency authority to operate. This further illustrates that MAHSA had no statutory review authority whatsoever over petitioner's ability to operate or contract.

This is the only agency mandated by the Act to make determinations of "need" for new health services, and then only through implementing state legislation.

3. *Statewide Health Coordinating Councils.*

The last tier created by the Act consists of Statewide Health Coordinating Councils (SHCCs) to coordinate the AIPs and HSPs of the HSAs and to revise, and approve or disapprove, the State Health Plan submitted by the state agency. 42 U.S.C. § 300m-3.

In addition to constructing this system to conduct health planning activities, the Act, as originally promulgated, provided immunity from damage liability for acts taken by individuals who are members or employees of an HSA:

> "[N]o individual who, as a member or employee of a health systems agency, shall, by reason of his performance of any duty, function, or activity required of, or authorized to be undertaken by, the agency under this subchapter, be liable for the payment of damages under any law of the United States or any state (or political subdivision thereof) if he has acted within the scope of such duty, function or activity, has exercised due care, and has acted, with respect to that performance, without malice toward any person affected by it." 42 U.S.C. § 300l-1(b)(4)(A)(ii).[9]

The foregoing immunity is noteworthy in several respects. First, it does not provide immunity against all liability, only from claims for monetary damage. Second, it only immunizes members or employees of the HSA from liability, not third

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[9] The Act also creates an immunity from damages for the HSA itself. 42 U.S.C. § 300l-1(b)(4)(A)(i). These immunities were amended by the Health Planning and Resources Development Amendments of 1979, P.L. 46-79, § 110(a)(1), 93 Stat. 592, to exempt activities performed without gross negligence, as well as without malice, from claims for damages. *See generally* H.R. Rep. No. 96-420 (Conf. Rep.) 90th Cong., 1st Sess., 66 (1979) *reprinted in* 1979 U.S. Code Cong. & Admin. News 1422, 1434.

parties. Third, it requires that a particular standard of care must be met for the immunity to attach.

C. The Doctrine Of Implied Repeal Has No Application In This Case

This Court has emphasized that the doctrine of implied repeal is a judicially created exemption from the application of the antitrust laws, designed to resolve clear conflicts between prohibitions contained in the antitrust laws and conduct mandated or required by other federal statutory schemes which regulate the industry in question. *Federal Communications Commission v. RCA Communications, Inc. ("RCA")*, 346 U.S. 86 (1953); *Gordon v. New York Stock Exchange, Inc. ("Gordon")*, 422 U.S. 659, 682 (1975). The doctrine is strongly disfavored and has been applied only in "particular and discrete circumstances" when the judiciary discerns that Congress, by implication, determined that the federal agency, entrusted with regulation in the public interest, could carry out its responsibilities only if it were free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws. *United States v. National Ass'n. of Securities Dealers*, 422 U.S. 694 (1975); *Carnation Company v. Pacific Westbound Conf.*, 393 U.S. 213 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

Application of the doctrine requires a finding of two elements. First, there must be a "plain repugnancy" between the antitrust laws and the regulatory provisions. *United States v. Philadelphia National Bank, supra*, 374 U.S., at 351 (1963); *Gordon, supra; Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 455-457 (1945). When the agency in question does not have the power to regulate the conduct in question, the doctrine cannot be applied. *Georgia v. Pennsylvania Railroad Co., supra*, 324 U.S., at 457-460 (1945); *see also Cantor v. Detroit Edison Co.*, 428 U.S. 529, 595-597, 597, fn. 37 (1976). In making this determination, an essential factor is whether the specific conduct in question was the product of regulatory

coercion or the result of the exercise of independent business judgment. Where the involved agency has not curtailed the regulated entities' activities and the conduct at issue is the product of independent business judgment, as opposed to regulatory coercion, the need to imply the immunity disappears. *See United States v. RCA,* 358 U.S. 334, 350-351 (1959); *MCI Communications Corporation v. A.T.& T.,* 462 F.Supp. 1072, 1083 (N.D.Ill. 1978), *citing Cantor v. Detroit Edison Co., supra,* 428 U.S., at 593 (1976).

The second required element is a finding of congressional intent that the regulatory scheme should prevail over the antitrust laws. If not, the immunity will not be implied. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973); *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 305 (1963).

Even where the court determines that there is a "plain repugnancy" between the regulatory scheme and the antitrust laws, the implied repeal of the antitrust laws is limited and will be extended only to the extent "necessary to make the [regulatory scheme] work." *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963).[10]

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[10] The extremely limited nature of implied repeal finds its corollary in this Court's construction and interpretation of express antitrust exemptions. In legislation where Congress has expressly enacted antitrust exemptions, this Court has construed them quite narrowly. For example, in *Group Life & Health Insurance Co. v. Royal Drug Co.,* 440 U.S. 205, 231 (1979), this Court narrowly interpreted the scope of the McCarran-Ferguson Act which created an antitrust exemption for specified types of insurance activities. This Court held that agreements between insurance companies and retail pharmacies affecting the price of prescriptions paid by the insurance company's policyholders were not the business of insurance and, therefore, could not be exempt from antitrust scrutiny. By contrast, the boycott exemption to the McCarran-Ferguson immunity was significantly broadened by this Court in *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531 (1978). In that case, this Court determined that the boycott exemption should not be limited to "black-lists" of insurance companies, agents or other competitors of the boycotting group but was applicable to refusals to deal with those outside the insurance industry as well.

1. *There Is No "Plain Repugnancy" Between The Act and the Antitrust Laws.*

The conduct immunized from antitrust scrutiny by the decision of the Court of Appeals was respondents' requirement that in order to become a participating Blue Cross hospital petitioner was required to secure favorable *need review* from MAHSA. Although that conduct was not authorized, sanctioned, required or otherwise referred to in the Act, the Court of Appeals found a "clear repugnancy" between the Act which "clearly call[ed] for the action which [became] the basis of an antitrust claim" and the antitrust laws. 628 F.2d, at 1055-1056. The Court of Appeals also found that lack of state participation, at any level in the challenged conduct, did not preclude finding a "clear repugnancy" because, as the Court stated, the Act ". . . designated MAHSA as a regulatory need review agency," and ". . . calls for a regulatory system which included the designated HSA implementing the HSP and AIP 'with the assistance of individuals and public and private entities in its health service area' (citation omitted)." 628 F.2d, at 1055. The Court of Appeals categorized "the extent of [the Act's] regulatory scheme" by noting as did the District Court, the problems in health care delivery in the health service area identified in MAHSA's HSP, together with the various goals and objectives for meeting those problems.[11]

The problem with the Court of Appeals' analysis, however, is threefold. First, its characterization of MAHSA as a regulatory need review agency is erroneous. With the exception of

[11] 628 F.2d, at 1055. It is noteworthy that neither the goals of MAHSA, nor the methods for attaining those goals, as identified by the Court of Appeals, specifically prohibits hospital construction or hospital contracts with third parties (such as respondents) for the receipt of payment for services rendered. Similarly, MAHSA goals and objectives do not contain any reference to serving as a *need review* agency for respondents.

the responsibility to make certain determinations on federal funding applications not applicable herein, MAHSA has no regulatory or adjudicatory function.[12]

Second, whether MAHSA is a regulatory agency (which it is not) is not the relevant consideration. In adjudicating *need approval* for Blue Cross, MAHSA was not acting in a regulatory capacity as the Act clearly does not require, sanction or authorize HSA participation in private decision making.[13]

Further, it was not MAHSA conduct that was under review, rather it was the conduct of Blue Cross, and that conduct was neither mandated nor coerced by any federal or state legislation, nor was it subject to any review or supervision by any state or federal agency.[14]

The Court of Appeals' error is brought into sharp focus when its analysis is compared to factual situations that existed in other cases involving regulated industries where this Court rejected the application of the implied repealed doctrine. For example, in *United States v. Radio Corporation of America, supra,* this Court found defendants subject to the antitrust laws even though the action under review, an exchange of broadcasting licenses, was specifically approved by the Federal Communications Commission as being an action which met the

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[12] The only regulatory or adjudicatory agencies created by the Act, authorized to make determinations as to whether new facilities should exist, are the State Health Planning and Development Agencies.

[13] *Cf. Silver v. New York Stock Exchange,* 373 U.S. 341, 353-357 (1968). In *Silver* this Court held there could be no application of the implied repeal doctrine because the Exchange Act did not provide for agency (SEC) jurisdiction or review of the challenged conduct. Because there was no governmental oversight of the Exchange's "self-regulatory action, and no method of insuring that some attention at least was given to the public interest in competition . . ." the doctrine could not be applied. *Gordon, supra,* 422 U.S., at 683-684.

[14] *Cf. Cantor v. Detroit Edison Co., supra,* 428 U.S., at 592-593. ("This Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." [Citation omitted.])

statutory requirement that the "public interest, convenience and necessity" would be served, because the Commission had not been given the specific authority by Congress to consider antitrust issues. In *Otter Tail Power Company v. United States, supra,* this Court held that even where an agency, such as the Federal Power Commission, has the authority to consider the competitive effects of its regulatory decisions, its involvement would not immunize private party conduct from antitrust scrutiny. The Court's holding was based on the conclusion that where conduct was governed "in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." 410 U.S., at 374.

More recently, in *Cantor v. Detroit Edison Company,* 428 U.S. 579 (1976) this Court again held that voluntary private action, even when approved by a public agency with regulatory authority, was not immune from antitrust scrutiny where the private parties' conduct was neither required, nor explicitly condoned, by the allegedly conflicting statute. This Court, therefore, rejected antitrust immunity for a private utility tariff approved by a state agency, despite the fact that the tariff, once approved, had the force and effect of law and could be changed only by seeking further approval of the state agency. 428 U.S., at 583.

In this case there has been no government agency participation, approval or acquiescence as in *RCA, Otter Tail* and *Cantor.* Instead there has been merely the voluntary private conduct of two nonprofit corporations which was not required or mandated by any law, and not subject to review or scrutiny by any state or federal agency.[15] Further, it cannot be said that

[15] The effect of the Court of Appeals' decision is also contrary to recent decisions of this Court which have had, and will have, the effect of subjecting private health care industry decisions to antitrust scrutiny. For example, in

(footnote continued on next page)

enforcement of the antitrust laws would interfere with MAHSA's operation. These laws neither prohibit MAHSA from continuing to implement its HSP and AIP, nor preclude it from forwarding its recommendations on new institutional health facilities to the appropriate state planning agency. The "plain repugnancy" which must exist for implied repeal to come into play, therefore, simply is not present.[16]

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Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) this Court held that expansion and relocation activities of a hospital were, for antitrust jurisdictional considerations, "in interstate commerce." In the same term this Court held that the Nonprofit Institutions Act exemption from the Robinson-Patman Act for puchases of supplies by a nonprofit hospital for its "own use" would not exempt all of the hospital's drug purchases from price discrimination liabilities. *Abbott Laboratories v. Portland Retail Druggists,* 425 U.S. 1 (1976). In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) this Court held that the "learned professions" were not exempt from antitrust scrutiny. In *Group Life & Health Insurance Co. v. Royal Drug,* 440 U.S. 205 (1979) this Court subjected pharmacy agreements to antitrust regulation by narrowly construing the antitrust exemption in the McCarran-Ferguson Act. Finally, in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum Inc.,* 445 U.S. 97 (1980) the "state action" exemption was narrowed to require active supervision and a clearly defined state policy to confer antitrust immunity. *Cf. Feminist Women's Health Center Inc. v. Mohammed,* 586 F.2d 530, 549-550 (5th Cir. 1978), *cert. denied* 444 U.S. 925 (1978); *Ballard v. Blue Shield of Southern West Virginia, Inc.,* 543 F.2d 1075 (4th Cir. 1976), *cert. denied,* 430 U.S. 922.

[16] One commentator has pointed out that allowing HSA activity to totally escape antitrust scrutiny is particularly dangerous because of the possiblity of "regulatory capture". *Miller, supra.* As the commentator points out,

> "Indeed, competition may be more important to stimulate efficient business practices in a regulated industry context than it would be in the absence of government control. This is particularly true when, as in the health industry, regulation is fragmented rather than pervasive. The planning act's CON requirements apply only to new institutional expenditures and services and to certain major medical equipment used for inpatients. Other segments of the health industry remain untouched by supply controls. Few states, moreover, regulate rates to protect against

(footnote continued on next page)

2. *Congressional Intent Does Not Support Application of The Implied Repeal Doctrine*

The Court of Appeals adopted the District Court's discussion of the legislative history, and found the requisite congressional intent to immunize the voluntary private action under review from the antitrust laws. 628 F.2d, at 1056. The District Court's review, insofar as it was adopted, consists of quotations from the Senate Committee Report discussing the Act and from Representative Paul Rogers made during the

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the monopoly profits—and inefficiencies—that entry barriers may facilitate." 68 Geo. L.J., at 891-892 (citations omitted).

The same commentator, as well as others, expresses a continuing concern over the practical effect of HSA decision making on providers. While the Act encourages public participation in health planning decision making, because it permits health providers to determine whether the "need" exists for other providers' proposals it invites anticompetitive behavior. While consumers must take part in the process, because their actions do not effect their economic survival, their incentives to prevent anticompetitive behavior cannot match the motivation of providers to indulge in such activity.

The commentator also notes that some observers have predicted that CON legislation would accomplish "little more than would a hospital that sought to maximize its own welfare through a cartel." 68 Geo. L.J., at 880. *See also* J. Christianson and W. McClure, "Developing a Regulatory Strategy Consistent with a Competitive Health Care System," in *Socioeconomic Issues of Health* 1980; C. Havighurst, Regulation of Health Facilities and Services by Certificate of Need, 59 Va. L. Rev. 1143 (1973).

While at this early date in health planning it is not possible to know whether "capture" will actually occur, this Court should be reluctant to preclude from the outset any antitrust scrutiny of health planning decisions which are ostensibly made in cooperation with HSAs, particularly when the HSA is not acting in its regulatory capacity and neither the decision of the HSA, nor the private entity (in this case Blue Cross), is subject to any scrutiny or review.

course of debate in connection with a later measure.[17] Neither of these sources supports the Court of Appeals' decision; and indeed, subsequent action by Congress clearly indicates a contrary intent.

(a) The Senate Committee Report

The consequences of the Act in terms of its effect on antitrust laws was neither contemplated nor discussed at the time of its passage. Throughout the entire legislative history no mention is made of any potential conflict with antitrust regulation; in fact, the subject of antitrust was not an issue while the Act was being considered. *See* S. Rep. No. 93-1285, H. Rep. No. 93-1382, H. Conf. Rep. No. 1640, 93rd.Cong., 2nd Sess. *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842 and Hearings Before The Subcommittee on Health of Committee on Labor and Public Welfare, 93rd Cong. 2nd Sess., Part I, March 11, 1974 and Part II, March 20, 26 and 28, 1974.

Although the Senate Committee expressed its concern that the health care industry did not "respond to classic market place forces," it did not in any fashion indicate that the Senate considered or attempted to exempt members of the health care industry from their legal responsibilities under the antitrust laws. *See* 1974 U.S. Code Cong. & Ad. News 7842, at 7878.

To the contrary, the debate leading to the enactment of Public Law 96-79, which amended the Act, indicates that Congress desired to preserve and foster competitive forces in

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[17] The District Court also made reference to the decision in *Huron Valley Hospital, Inc. v. City of Pontiac,* 466 F.Supp. 130 (E.D. Mich. 1979). In that case the District Court in *dicta* found the legislative history of the Act demonstrated "at least partially" congressional intent to repeal the antitrust laws. 479 F.Supp., at 1023. The Court of Appeals, however, placed no reliance on, and did not cite, the *Huron Valley Hospital* decision.

the health care industry wherever possible. This is evidenced in a number of ways. Initially, Congress mandated as a national health priority:

> "The strengthening of competitive forces in the health services industry wherever competition and consumer choice can constructively serve to advance the purposes of quality assurance, cost effectiveness, and access." Public Law 96-79, Section 1502(a) *amending* 42 U.S.C. § 300k-2.[18]

Next, legislative history indicates that Congress was well aware of the potential conflict between antitrust principles and health planning.[19] In spite of that awareness, and the fact that Congress in 1979 reviewed the immunity provisions of the Act, Congress chose not to create an antitrust immunity for the HSA or any other party who might be engaged in health planning although the precedent clearly existed for it to do so.[20]

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[18] To the same effect, Public Law 96-79 amended Section 1502 by adding the following:

> "(3) For the health services for which competition appropriately allocates supply consistent with health systems plans and State health plans, health systems agencies and state health planning and development agencies should, in the performance of their functions under this title, give priority effect of competition on the supply of such services." 42 U.S.C. § 300k-2(b)(3).

[19] Specifically, the House committee decided that the antitrust laws would not prohibit HSAs from acting within the scope of the Act. H.R. Rep. No. 190, 96th Cong., 1st Sess. 54-56 (1979).

[20] *E.g.* 49 U.S.C. § 1384 (1976), *as amended* by the Airline Deregulation Act of 1978, P.L. No. 95-504, 530(a) 92 Stat. 1731, provides that persons affected by certain orders made by the Civil Aeronautics Board shall be exempt from the operation of the "antitrust laws"; 49 U.S.C. § 10706 (a)(2)(A) *as amended* by Public Law 95-473, 92 Stat. 1377, in 1978 immunizes from the operation of the antitrust laws agreements approved by the Interstate Commerce Commission. Even where by statute Congress has immunized certain conduct approved by a regulatory agency, such as the Maritime Commission or the Civil Aeronautics Board, conduct not squarely within the four corners of the exemption remains subject to the antitrust laws. *Carnation Company v. Pacific Westbound Conf.*, 383 U.S. 213, 216-217 (1966); *Cain v. Air Cargo, Inc.*, 599 F.2d 316, 320, (9th Cir. 1979).

A further indication of the lack of congressional intent was the express rejection of a specific provision that would have mandated the conduct challenged herein. Section 1421(d) of the House passed version of the Act permitted states to require private health insurers (such as respondents), to limit payments to health provider institutions (such as petitioner) if the institution had not received a certificate of need from the state planning agency. This provision was specifically rejected in conference. *See* H.R. 16204, 93rd Cong. (1974); H. Conf. Rep. No. 1640, 93rd Cong. 2nd Sess. 78 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7842, 7987. Surely it cannot be asserted that Congress intended an exemption from the anti-trust laws for voluntary health planning activity by private health care insurers, when it considered and rejected the provision which would have created the power to compel that specific result.[21]

(b) The Statement of Representative Rogers

As further support for its finding of legislative intent, great reliance was placed by the Court of Appeals (and District Court) upon the remarks of former Representative Paul Rogers made during debate on proposed amendments to the Act under

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[21] It should be noted that the new Administration has proposed total phase out for the health planning program embodied by the Act. *See,* America's New Beginning: A Program For Economic Recovery, February 18, 1981, pp. 6-22. In making this endorsement the Administration states, "If competitive forces are to restrain costs, free entry into health care markets is essential. Otherwise, high cost providers can monopolize health care markets . . ." Elimination of this franchising system is a necessary element in the Administration's efforts to promote the effective functioning of private markets forces in the health care sector." *Id.* At the moment there are a number of bills pending in Congress designed to promote competition in the health care industry. E.g., S. 1590 (The Comprehensive Health Care Reform Act); S. 1968 (The Health Incentives Reform Act); H.R. 5740 (The Health Cost Restraint Act); and H.R. 850 (The National Health Care Reform Act of 1981).

consideration in 1978. These amendments were never enacted (H.R. 11488, 95th Cong., 2nd Sess. [1978]).[22] Assuming, *arguendo,* that Mr. Rogers' remarks were an expression of congressional intent, they do not stand for the proposition expressed.[23]

While the Congressman did refer to "providers", it is clear from his remarks that he intended "provider" to mean a direct provider such as a hospital or other health care facility. He stated, that "congressional intent was for the HSA, the provider seeking the certificate of need and other providers which might seek to provide similar services to coordinate their activities to assure that new institutional health services are developed in accordance with the health systems plan for the area." 628 F.2d, at 1057. Only a health care facility (direct provider) is required to apply for a certificate of need, and only a direct provider affords "similar services". It is clear, then, that Mr. Rogers used the term "provider" as shorthand for hospital or other health care facility and not indirect providers such as respondents who do not provide health care services. Moreover, while the Court emphasized Representative Rogers' opinion that Congress intended that HSA and providers would not be subject to antitrust laws, the Court omitted the following language from the Congressman's statement which formed the basis for his belief

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[22] Because Representative Rogers statements were made during debate on amendments to the Act considered by a later Congress, but which were not enacted, the statements are of little or no significance in determining the intent of the earlier Congress which enacted the Act. *See Waterman Steamship Corp. v. United States,* 381 U.S. 252, 269 (1965); *United States v. Wise,* 370 U.S. 405, 414 (1962). Moreover, statements of legislators made during legislative discourse, but not in the context of debate on the act being construed, are entitled to little, if any, weight. *Castenada-Gonzalez v. INS* 564 F.2d 417 (D.C. Cir. 1977); *United States v. Sorrell,* 562 F.2d 227 (3rd Cir. 1977).

[23] Congressman Rogers' remarks are set forth in the Court of Appeals decision at 628 F.2d, at 1056-1057.

> "Title XV also requires that before an institution of health services is begun, the HSA must recommend to the state health planning agency whether the institutional health services is needed and a certificate of need should be granted. This control function directly affects entry into the market and competition. *Because such decisions are tied to a state certificate of need law,* however, there is little question whether they are exempt from antitrust laws." (Emphasis added.) Cong. Rec. H. 11962 (Oct. 10, 1978).

The omitted language is crucial for it succinctly indicates that the antitrust laws do not apply to certificate of need decisions made by the designated state agency because of the "state action doctrine," and not because of an implied repeal.[24] As important, the omitted portion is crucial for it emphasizes that an exemption for private parties' conduct was not articulated.

3. *The Court of Appeals Ignored Traditional Rules of Statutory Construction In Construing the Antitrust Laws*

In the Act Congress provided for a specific, limited immunity in 42 U.S.C. § 300l-l(b)(4)(A). That immunity was reviewed and extended by Congress in 1979. In neither the initial legislation nor the subsequent amendment did Congress create a specific exemption from the antitrust laws for private parties. Instead, immunity was limited to the payment of damages and to individuals who were members or employees

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[24] It is important to distinguish, as did the Court of Appeals (682 F.2d, at 1054), the implied repeal doctrine from the state action exemption. Where conduct engaged in by private persons is illegal, the same conduct undertaken by state officials pursuant to an express legislative mandate will not be held to violate the antitrust laws. *Parker v. Brown,* 317 U.S. 341 (1943). Even "state action" immunity, however, will only be found were the challenged restraint is "one clearly articulated and affirmatively expressed as state policy" and the policy is actively supervised by the state itself. *California Retail Liquors Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

of an HSA where the conduct in question was "required of, or authorized to be undertaken by, *the* [*HSA*]."[25] (Emphasis added).

In spite of the requirement that in construing statutory provisions all the words and provisions of a statute "are intended to have meaning in order to be given effect" (*Wilderness Society v. Morton,* 479 F.2d 842, [D.C. Cir.] *cert. denied* 411 U.S. 917 [1973]), the Court of Appeals failed to consider the effect of the immunity provision. If Congress had intended to create an immunity from the antitrust laws for private parties, it could have, either in the original enactment or when it was subsequently amended. In fact, it chose not to do so.

The Court of Appeals also ignored the doctrine of *expressio unius est exclusio ulterius* which has explicitly been used by this Court in interpeting exemptions granted under the antitrust laws. For example, in *United States v. Borden Co.,* 308 U.S. 188, 201 (1939) this Court found that the explicit immunity provisions contained in the Agricultural Marketing Agreement Act defined the extent Congress intended that act should operate to render the Sherman Act inapplicable, holding

> "If Congress had desired to grant any further immunity, Congress would have done so."

Similarly, this Court in construing the Shipping Act, which contains an explicit provision exempting certain acts from antitrust scrutiny, held that conduct not covered by these explicit provisions could not be exempted. *Carnation Company v. Pacific Westbound Conf., supra,* 383 U.S., at 216-217.

The conclusion in this matter is unambiguous. Congress specifically provided immunity from damages for members or employees of a health systems agency in the performance of their duties. No other immunity was enacted or discussed. It must be inferred that Congress considered the question of creating immunity to make the Act function and determined that immunity was only to be available to the extent ultimately expressed. That expression does not extend to the conduct of third parties such as respondents.

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[25] *See* fn. 7 *supra.*

IV. CONCLUSION

The decision by the Eighth Circuit Court of Appeals exempts private anticompetitive conduct in the health care industry from the scrutiny of the antitrust laws. That conduct was not authorized or approved, nor subject to supervision or review by any federal or state agency. Yet, its potential anticompetitive effects have been placed beyond review as the result of two erroneous conclusions: (1) that there is a "plain repugnancy" between the National Health Planning and Resources Development Act and the antitrust laws; and (2) that Congress intended that private health planning activities be exempt from antitrust scrutiny.

This Court has determined, however, that such private conduct, wholly voluntary in nature, because of its potential pernicious anticompetitive effects must be subject to antitrust scrutiny. For this reason, the decision of the Court of Appeals for the Eighth Circuit must be reversed and the cause remanded for a trial on the merits.

Respectfully submitted,

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